THE EFFECT OF WAR UPON A PARTNERSHIP WHERE THE PARTNERS ARE RESIDENT IN HOSTILE COUNTRIES.—Under the Roman law, upon which our law of partnership is largely based, there could be no *societas* or partnership composed of a Roman citizen and an alien.[1] It is, however, the settled rule, both in England and in the United States, that a citizen may enter into a partnership agreement with an alien.[2] If the alien later becomes an alien enemy and is resident in a hostile country, it would seem that the partnership would be *ipso facto* dissolved by act of law, particularly when the purpose of the firm is commercial intercourse between the belligerent countries. When is it, therefore, that an alien becomes an alien enemy? Black defines an "alien enemy" as "an alien who is the subject or citizen of some hostile state or power." [3] In international law, domicile seems to be the chief criterion in defining an enemy alien.[4] Thus an American citizen, resident in Germany, would, for the duration of the war, for all practical purposes be considered an alien enemy; and, conversely, a German citizen, resident in this country, would be an alien enemy of Germany.[5] As defined by Act of Congress, an "enemy" includes "any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory." [6]

There is a slight conflict of authority as to the effect of war upon a partnership composed of a citizen, resident in one country, and an enemy alien, resident in the hostile country, when the purpose of the partnership is commercial intercourse between the two warring nations. It has been argued, and some of the text-writers have doubtingly maintained, that such a partnership is merely suspended, and not dissolved.[7] But the better view is that, because of the necessity of continued intercourse, the partnership is dissolved.[8] The position in which the partners are placed as enemies makes unlawful the communication between them that is essential to the partnership business, and is entirely inconsistent with such business, the object of which requires the joint application of the skill, labor and enterprise of the partners, as well as of their funds.[9] The rule is

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[1] 2 ROBY, ROMAN PRIVATE LAW, p. 129; MOYLE, IMPERATORIS IUSTINIANI INSTITUTIONES, pp. 156, 444.

[2] MECHEM, ELEMENTS OF PARTNERSHIP, § 22.

[3] BLACK, LAW DICTIONARY, 2nd ed., 57. See also Krachanake *v.* Acme Mfg. Co., 175 N. C. 435, 95 S. E. 851, Ann. Cas. 1918E, 340.

[4] TAYLOR, INTERNATIONAL PUBLIC LAW, §§ 203, 517.

[5] 1 LINDLEY, PARTNERSHIP, 2nd Am. ed., § 73.

[6] Comp. Stat. '17 (Temp. Supp.), § 3115½aa. (Act Oct. 6, 1917, C. 106, § 2.)

[7] GILMORE, PARTNERSHIP, § 24; MECHEM, ELEMENTS OF PARTNERSHIP, § 250.

[8] Hanger *v.* Abbott, 6 Wall. 532; Griswold *v.* Waddington, 16 Johns. (N. Y.) 438; Seaman *v.* Waddington, 16 Johns. (N. Y.) 510; Woods *v.* Wilder, 43 N. Y. 164, 3 Am. Rep. 684. And see *dictum* in Small *v.* Lumpkin, 28 Gratt. (Va.) 832.

[9] McAdams *v.* Hawes, 9 Bush (Ky.) 15.

based upon considerations of public policy, and is not dependent upon the intention of the parties.[10] Hence an agreement between them to continue the business is void as against public policy.[11]

The theory that dissolution occurs is supported by the best secondary authority,[12] although some text-writers attempt to qualify the absolute rule,[13] and others maintain that under certain circumstances the partnership is revived by peace and does not have to be created anew.[14] The cases, in which the question was adjudged, and the *dicta* in other cases are practically unanimous in the opinion that such a partnership is absolutely dissolved *ipso facto* at once upon a declaration of war, and can be re-created, but not revived, when the war is over.[15]

The leading case in the United States on this point is *Griswold* v. *Waddington,* 16 Johns. (N. Y.) 438.[16] The plaintiffs, American citizens resident in America, sued the defendant, an American citizen resident in America, on a contract made during the War of 1812 between the plaintiffs and the defendant's partner, an American citizen resident in England. It was held in a masterful opinion by Chancellor Kent, in which he exhausted the entire authority on the subject, that the contract was unlawful and unenforceable, as arising out of illicit intercourse with an alien enemy during a state of war, and that, furthermore, the partnership between the defend-

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[10] Bank of New Orleans *v.* Matthews, 49 N. Y. 12.

[11] Planters' Bank *v.* St. John, 19 Fed. Cas. 809.

[12] 30 Cyc. 655, where it is said: "As a rule the breaking out of war operates to dissolve a partenrship, requiring commercial intercourse between the belligerent states, because such intercourse is illegal."

The rule is thus stated in a note in 69 Am. St. Rep. 418: "A declaration of war *per se* and at once effects a total dissolution of a partnership existing between residents of hostile states, for commercial intercourse between states at war with each other is interdicted."

[13] In GILMORE, PARTNERSHIP, § 24, it is said: "When, however, actual war breaks out between the United States and the nation of the alien, it not only prevents a voluntary resident of the latter from joining a partnership here, but the partnership, once formed, necessarily is suspended, and, in effect, dissolved, since the partners are barred from commercial intercourse with each other." But the author seems to qualify the arbitrary rule of *ipso facto* dissolution, saying: "If the partnership and its business is of such a nature that an entire suspension of all intercourse during the war would not be inconsistent with a continuance of the relation, it might very well be regarded as revived on the suspension of hostilities"

[14] See PARSONS, PARTNERSHIP, 2nd ed., p. 29, where it is said: "And if there be a partnership with an alien friend, and war breaks out between the countries, it entirely suspends the partnership. From the language sometimes used, it might be inferred that a war would terminate and annul such partnership altogether. * * * But where the terms and business and state of affairs of the partnership were such that an entire suspension of all rights and intercourse during the war would still leave the partnership in a condition to go on as before, when the war ended, we should say that the partnership revived by peace, and did not need to be created anew."

[15] See excellent note in L. R. A. 1917C, 662, 669, and cases cited. Also note in 69 Am. St. Rep. 410, 418, and cases cited.

[16] *Supra.*

ant, resident in America, and his partner, resident in England, was dissolved upon the outbreak of the war.

In the language of the opinion:[17]

> "It appears to me, that the declaration of war did, of itself, work a dissolution of all commercial partnerships existing at the time between British subjects and American citizens. By dealing with either party, no third person could acquire a legal right against the other, because one alien enemy cannot, in that capacity, make a private contract binding upon the other. * * * To suppose a commercial partnership (such as this was) to be continued, and recognized by law as subsisting, when the same law had severed the subjects of the two countries, and declared them enemies to each other, is to suppose the law chargeable with inconsistency and absurdity. * * * Why preserve the skeleton of the firm, when the sense and spirit of it has fled, and when the execution of any one article of it by either, would be a breach of his allegiance to his country? * * * If one alien enemy can go on and bind his hostile partner, by contracts in time of war, when the other can have no agency, consultation, or control concerning them, the law would be as unjust as it would be extravagant. The good sense of the thing as applicable to this subject, is the rule prescribed by the Roman law, that a copartnershihp in any business ceased, when there was an end put to the business itself."

In an able supplementary opinion in the same case, Senator Van Vechten says:[18]

> "The act of dissolution by war emanates from the sovereign power of the government, without the personal assent of either of the partners."

Whether the decision in this justly famous case was based upon the dissolution of the partnership or merely upon the illegality of the contract, the New York courts have consistently followed the opinion of the court, as expressed by the learned Chancellor, that a commercial partnership between residents of hostile countries is at once dissolved upon the declaration of war.[19] A strong reason why it should not be merely suspended is that, in such case, it would be revived by a proclamation of peace, perhaps after years of bitter struggle and change of circumstances, during which the mutual confidence that had existed before the war would have been lost, and possibly with it the initial incentive for the partnership contract.

The other States and the Federal courts have followed the New York rule, and have adopted the practical and logical reasoning of Chancellor Kent as the basis for their decisions. The principal cases involving the point were decided just after the Civil War, in

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[17] At page 488. [18] At page 504.

[19] Woods *v.* Wilder, *supra;* Hubbard *v.* Matthews, 54 N. Y. 43, 13 Am. Rep. 562. See *dictum* in Cohen *v.* N. Y. Mutual L. Ins. Co., 50 N. Y. 610, 10 Am. Rep. 522.

the courts of the Border States,[20] in the Federal courts,[21] and in New York.[22] There seems to be no case in the United States, in which the doctrine of dissolution is seriously questioned; and hence it is reasonable to believe that all partnerships existing prior to our entry into the European War, between residents of the United States and those of subsequently hostile countries, were *ipso facto,* by act of law, dissolved immediately upon the declaration of war.[23]

RIGHT OF OWNER OF BANK NOTE TO RECOVER ITS FACE VALUE IN CASE OF LOSS OR DESTRUCTION.—It is a well settled principle of the law merchant that the owner of a lost negotiable note can recover of the maker or indorser its true amount, if he can establish its former existence by secondary evidence; but he must give the maker or indorser an indemnity, securing him against the future reappearance of the note in the hands of a *bona fide* purchaser for value.[1] A recovery may likewise be had where the note is wholly destroyed, though in this case a bond of indemnity need not be given, as it is impossible for the note to be presented again.[2] However, the fact of destruction must be proved beyond a reasonable doubt, or else indemnity will be required.[3]

A private note, that is, one made by one person in favor of another and not designed to circulate as currency, has an individuality and distinctiveness of appearance not possessed by a bank note. The latter is usually issued as one of a large series, practically uniform in pattern. This similarity in appearance is especially marked at present, when all the bank notes in the country are issued either by the national or the Federal Reserve banks and engraved for them by the Treasury Department. The only marks identifying a particular note are the names of the issuing bank, its president and cashier, and certain numerals and letters appearing on its face. Again, bank notes pass in the commercial world as freely as the currency of the government itself, being payable to bearer, whereas private notes usually pass by indorsement and through comparatively few hands before they are presented for payment. Thus it will be seen that the difficulty of identification upon loss or destruction is far greater in the case of a bank note than in that of a private note.

This circumstance is the basis of all the trouble in a claim by the unfortunate owner of a lost or destroyed note against the bank

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[20] Taylor *v.* Hutchinson, 25 Gratt. (Va.) 536, 18 Am. Rep. 699; Booker *v.* Kirkpatrick, 25 Gratt. (Va.) 145. See *dictum* in N. Y. Life Ins. Co. *v.* Clopton, 7 Bush (Ky.) 179, 3 Am. Rep. 290.

[21] The William Bagaley, 5 Wall. 377.

[22] See note 19, *supra.*

[23] War was declared on Germany on April 6, 1917, and on Austria-Hungary on December 7, 1917.

[1] 2 DANIEL, NEGOTIABLE INSTRUMENTS, 6th ed., § 1480; 2 PARSONS, NOTES AND BILLS, 2nd ed., p. 302.

[2] Wofford *v.* Board of Police, 44 Miss. 579; Scott *v.* Meeker, 20 Hun (N. Y.) 161.

[3] Moses *v.* Trice, 21 Gratt. (Va.) 556.